SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Citation to opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional provisions, statutes and rules involved	3
Statement of the case	4
Reasons for granting the writ	6
Conclusion	17
Appendix A: Constitutional provisions, statutes and rules	1a
Constitution of the United States	1a
Internal Revenue Code of 1939	1a
Internal Revenue Code of 1954	2a
United States Code	3a
Federal Rules of Criminal Procedure	4a
Appendix B: Opinions and judgments below	7a
Court of Appeals opinion on remand	7a
Court of Appeals judgment on remand	29a
Judgment and commitment:	
H. A. Lott	30a
Lee Blocker	32a
Lorn D. Frazier	34a
Appendix C: Indictment	37a
Appendix D: Newspaper article	47a

CITATIONS

Cases

Hudson v. United States, 272 U.S. 451 (1926)	10
Ingram v. United States, 360 U.S. 672 (1959)	14
Lawn v. United States, 355 U.S. 339 (1958)	14
Lott v. United States, 367 U.S. 421 (1961)	8
Payne v. Mandigan, 274 F. 2d 702 (9 Cir. 1960), aff'd 366 U.S. 761 (1961)	16

	Page
Pollard v. United States, 352 U.S. 354 (1957)	11
Russell v. United States, 369 U.S. 749 (1962)	14
Small v. United States, 255 F. 2d 604 (1 Cir. 1958)	14
Townsend v. Burke, 334 U.S. 736 (1948)	12
Tucker v. United States, 196 Fed. 260 (7 Cir. 1912)	10
United States v. Goldberg, 206 F. Supp. 394 (E.D. Pa. 1962)	7, 15
United States v. Johnson, 123 F. 2d 111 (7 Cir. 1941), rev'd 319 U.S. 503 (1943)	15
United States v. Norris, 281 U.S. 619 (1930)	8
Young v. United States, 274 F. 2d 698 (8 Cir. 1960), aff'd 366 U.S. 761 (1961)	16

Constitution

U. S. Const. amend. VI	7, 10, 14

Statutes

Internal Revenue Code of 1939:	
Section 145(a)	16
Section 145(b)	4
Internal Revenue Code of 1954:	
Section 7201	4
Section 7203	16
Section 7207	16
18 U.S.C. §371	4, 16

Rules

Federal Rules of Criminal Procedure:	
Rule 11	6, 8
Rule 31(c)	16
Rule 32	6, 11
Rule 36	16

Miscellaneous

Annual Report of the Commisioner of Internal Revenue for the Fiscal Year Ended June 30, 1961	13
The Houston Post, May 22, 1960	8

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Petitioners, H. A. Lott, Lee Blocker and Lorn D. Frazier, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case (No. 17,888 below) on September 25, 1962.

History of the Case

This is the second time that this case has been before this Court. The Court of Appeals originally dismissed the appeal on the ground of lack of jurisdiction. 280 F. 2d 24 (5 Cir. 1960). After granting certiorari, this Court determined that jurisdiction was present and remanded the case to the Court of Appeals for decision on the merits (No. 238, October Term, 1960). The opinion of this Court is reported at 367 U.S. 421. On remand from this Court, the Court of Appeals affirmed Petitioners' convictions.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, on remand, printed in Appendix B hereto, *infra*, p. 7a, is reported at ..... F. 2d ....

JURISDICTION

The judgment of the Court of Appeals, on remand, was dated and entered September 25, 1962 (T.R. 31;[1] *infra*, p. 29a). No petition for rehearing was filed with the Court of Appeals. Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254(1), and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

The questions forming the basis for this petition for certiorari, are as follows:

1. Whether the action of the District Court in deferring sentencing, and basing the convictions and sentences upon evidence adduced at the trial of others charged in the indictment, violated Petitioners' rights under the Sixth Amendment and constituted a rejection of the pleas of *nolo contendere* which resulted in loss of jurisdiction to convict and sentence Petitioners upon such pleas.

2. Whether the three-month delay in sentencing Petitioners, during which time the sentencing judge presided at the trial of others charged in the indictment, was unreasonable under the circumstances of the case and resulted in Petitioners being deprived of due process of law.

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[1] The certified copy of the record filed herewith is in two parts. The first part includes all the proceedings before the previous grant of certiorari by this Court; references designated "R" are to the first part. The second part includes the proceedings in the Court of Appeals upon remand by this Court; references designated "T.R." are to the second part of the record.

3. Whether an indictment purporting to charge *individual* officer-employees with attempting to evade *corporate* income taxes, and conspiracy to do so, is sufficient wherein:

(a) The indictment does not charge what part the accused officer-employees *individually* had in the alleged attempt to evade corporate income taxes.

(b) The indictment does not charge that there was a deficiency in the payment of income taxes by the corporation, or that the accused had knowledge of any deficiency.

(c) The conspiracy count of the indictment purports to charge a single conspiracy to attempt to evade taxes for *four* separate years.

(d) The conspiracy count of the indictment does not charge all the basic elements of the substantive offense of attempted evasion of corporate income taxes.

4. Whether imposition of prison sentences for felony offenses (in excess of one year) was beyond the jurisdiction of the District Court wherein the written judgments adjudged that Petitioners were convicted of the misdemeanor offenses of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns."

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves U.S. Const. amends. V, VI; Int. Rev. Code of 1939, ch. 1 §§145(a), 145(b), 53 Stat. 62, as amended, 57 Stat. 144; Int. Rev. Code of 1954, ch. 75, §§7201, 7203, 7207, 68A Stat. 851, 853; Conspiracy Act, 62 Stat. 701, 18 U.S.C. §371; Fed. R. Crim. P. 7(c), 11,

31(c), 32, 35, 36. The foregoing constitutional provisions, statutes and rules are printed in Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE

The three Petitioners were convicted, fined and sentenced to imprisonment by the United States District Court for the Southern District of Texas, Houston Division, on the basis of a Federal grand jury indictment (R. 11-23), printed in Appendix C hereto, *infra*, p. 36a, which purports to charge them, along with Richard A. Farnsworth, Sr., and Alan Farnsworth, in five counts. Counts 1 through 4 purport to charge a willful attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc. (a Texas corporation) for the years 1951 through 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 (counts 1-3), and Section 7201 of the Internal Revenue Code of 1954 (count 4). Count 5 purports to charge a conspiracy to willfully attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc., for the same years, in violation of 18 U.S.C. §371. Petitioners were employee-officers and minor stockholders (approximately 7% among them) of the corporation (R. 111, 533).

Following return of the indictment on April 14, 1958, Petitioners were arraigned and pleaded "not guilty" (R. 24). They filed motions to dismiss the indictment (R. 62), for severance (R. 47), and for a bill of particulars (R. 24, 82), but these were denied (R. 347). Petitioners then asked to be rearraigned for the purpose of entering pleas of *nolo contendere* (R. 444, 466). Acceptance of the pleas was opposed by the Government (R. 444-446, 466), but they were accepted by the District Court on March 17 and 20, 1959 (R. 464, 483).

After accepting such pleas, the District Court deferred sentencing and presided at the trial of Richard A. Farns-

worth, Sr., and Alan Farnsworth under the indictment. This jury trial commenced early in April, 1959, and lasted through eleven weeks. Alan Farnsworth was found not guilty on all counts, but the jury failed to reach a verdict as to Richard A. Farnsworth, Sr. Although almost three and one-half years have elapsed since the mistrial, Richard A. Farnsworth, Sr. has not been retried.

Following the frustrating efforts of the Government in the Farnsworth trial (which ended June 9, 1959), Petitioners were called before the District Court on June 19, 1959, for sentencing (R. 487). During the sentencing proceedings repeated reference was made to evidence adduced at the Farnsworth trial (R. 488, 525, 532, 550). Petitioners were orally sentenced to serve terms of imprisonment, three years in the case of Blocker and two years each in the cases of Lott and Frazier, and each of the three was fined $20,000 (R. 551-552). The written judgments were filed on June 22, 1959; they adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns," although they refer to the statutes set out in the indictment (R. 553-559; *infra*, pp. 30a-35a).

Entry of the judgments was followed by the timely filing of motions in arrest of judgment by all Petitioners (R. 559-566), which were denied (R. 568-569), and notices of appeal to the Court of Appeals (R. 572, 613). The appeals were originally dismissed by the Court of Appeals for want of jurisdiction (R. 710), 280 F. 2d 24 (5 Cir. 1960), but this Court granted certiorari, reversed and remanded the case to the Court of Appeals, 367 U.S. 421 (1961). Although the questions presented in this petition were briefed and argued before this Court on the previous grant of certiorari, this Court confined its review to the jurisdictional question and remanded the case to the Court of Appeals for decision of

the issues raised by the appeal. 367 U.S. 421 (1961). Upon remand, the Court of Appeals (after re-argument and nearly ten months of deliberation on the case) affirmed the judgments of conviction and sentences (T.R. 31; *infra*, p. 29a).

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

1. This case involves extremely important questions of federal criminal procedure which should be determined by this Court.

2. The handling of this case represented a sharp departure from the customary and accepted practice in criminal cases.

3. The function and place of the plea of *nolo contendere*, authorized by Rule 11,[2] is clouded by doubt and confusion which should be clarified by this Court. In this case, after entering the plea, the Petitioners were in effect tried *in absentia* and convicted and sentenced on the basis of evidence adduced at a trial to which they were not parties.

4. What constitutes an "unreasonable" delay in sentencing, within the meaning of Rule 32(a), should be clarified by this Court. In this case a studied and deliberate delay of three months, which was highly prejudicial to Petitioners, was sanctioned by the Court of Appeals.

5. The Court of Appeals sanctioned use of a form of indictment which, although in common usage in personal tax evasion cases, utterly fails to inform the

[2] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

accused of the nature and cause of the accusation against him when applied to a corporate tax evasion case involving employees of a large corporation and *does not adequately charge the essential elements* of the offense of attempted income tax evasion.

6. The decision of the Court of Appeals, insofar as it upholds the conspiracy count of the indictment, is in direct and irreconcilable conflict with a very recent decision of the United States District Court for the Eastern District of Pennsylvania. *United States* v. *Goldberg*, 206 F. Supp. 394, 397 (1962).

7. The effect of a variance between the oral pronouncement and the written judgment in a criminal case is a very live issue which should be resolved by this Court. In this case Petitioners were sentenced for felonies although the written judgments seemed to convict them of misdemeanors.

8. The decision of the Court of Appeals was wrong.

Trial in Absentia

The handling of this case represented a sharp departure from customary and accepted practice in criminal cases. Petitioners were in effect tried *in absentia*. Contrary to the Sixth Amendment they were sentenced, after an unreasonable delay, on the basis of evidence adduced at another trial — as is made plain by the statements of the judge on the day of sentencing. Indeed, when this case was last before this Court, in the Government's brief, pp. 34-35, the Solicitor General admitted that "If they [Petitioners] were sentenced on evidence adduced at the trial of their co-defendants, they may have been deprived of their rights under the Sixth Amendment . . . ."

The unusual action of the trial court, which was sanctioned by the Court of Appeals, creates considerable doubt

concerning the application and effect of the plea of *nolo contendere* authorized by Rule 11 — which doubt should be resolved by this Court. Existence of the doubt, and the importance of the question, is shown by the statement of policy of the United States District Court for the Southern District of Texas — apparently as a result of this case — that pleas of *nolo contendere* by individuals in felony cases will no longer be accepted, as reported in The Houston Post, May 22, 1960, Sec. 1, p. 16, reproduced in Appendix D., *infra*, p. 47a. Unless review is granted, such defendants in the Southern District of Texas will not have the opportunity to enter such a plea. That seems to be an unwarranted restriction of judicial discretion which was not contemplated by Rule 11.

Nolo contendere is not a waiver or consent to be tried by the court; neither does it constitute a conviction or a determination of guilt. This much at least was established by this Court when this case was last here. *Lott* v. *United States*, 367 U.S. 421 (1961). As this Court held earlier in *United States* v. *Norris*, 281 U.S. 619 (1930), when a plea of *nolo contendere* has been received, nothing remains for the court to do but to render judgment and sentence on the plea as no issue of fact can exist and none can be made to exist while the plea remains of record. Thus the plea of *nolo contendere* precludes a trial of the issue of guilt or innocence. Such a plea permits the court, without more, to sentence the accused, but only on the basis of the plea.

In this case the trial court accepted Petitioners' pleas of *nolo contendere*, but then deferred sentencing and proceeded to try the Farnsworths, who had been indicted jointly with Petitioners. Petitioners were in practical effect on trial during the Farnsworth trial, although they were neither present nor represented, were not parties

to the trial and were not confronted with the witnesses against them. Evidence against Petitioners was received without benefit of cross-examination or rebuttal evidence on their behalf. They were tried *in absentia*.

The single most significant fact is the inescapable conclusion that the issue of guilt or innocence of these Petitioners was tried by the trial court. This is dramatically shown by the opening note struck on the day of sentencing. The trial court asked if the Government had anything to say. The Government's counsel stated (R. 488):

> "Your Honor, I believe the Court has heard the *facts tried* following these gentlemen's pleas."

While the statement of the Government's counsel is not binding upon the trial court, there is not the slightest doubt that this was the trial court's opinion also since it said virtually the same thing later in the sentencing proceedings. The last character witness for Mr. Lott, Reverend Westmoreland, testified (R. 550):

> "I would like to say that every member of our congregation would come here as a witness in his behalf, and they would say that he is one of the cleanest Christian men we have ever known."

Whereupon, the trial court turned to Reverend Westmoreland and said (R. 550):

> "But none of them were present during the ten weeks of testimony, were they?"

It clearly appears from the statements made in court on the day of sentencing that Government counsel and the trial judge had the Farnsworth trial and the evidence adduced therein uppermost in their minds. Shortly thereafter the trial court orally sentenced from the bench as follows (R. 551):

> "I have found each [defendant] guilty of the felonies as contained in the Grand Jury indictment."

To those present in the courtroom that day, the oral sentence by the trial court was obviously based upon what had been heard in the Farnsworth trial. Indeed, it was apparent to all that the trial court itself had found as a fact that Petitioners were guilty as charged in the indictment — from the *evidence,* not on the basis of their pleas of *nolo contendere.* In practical effect Petitioners were tried by the trial court. The written judgments state that "It is adjudged that the defendant is guilty as charged and convicted" (*e.g.,* R. 554; *infra,* p. 30a).

That Petitioners were prejudiced seems obvious in the light of the sentences imposed. After the lengthy trial of the co-defendants, the jury found one vice president innocent and the guilt or innocence of the chairman of the board could not be agreed upon. A question is raised in these circumstances as to why the trial court did not impose merely a fine or at most a suspended sentence on these Petitioners, unless it is true that the trial court had decided — on evidence adduced at the Farnsworth trial — that these Petitioners were guilty as charged in the indictment. Everything points to the fact that Petitioners were convicted and sentenced on evidence adduced at a trial they did not attend. The error is great and its results plain.

Such proceedings certainly violated Petitioners' rights under the Sixth Amendment. Furthermore, it appears that the action of the trial court constituted an implied rejection of the pleas of *nolo contendere* and that it thereby lost jurisdiction to convict and sentence Petitioners upon such pleas. *Tucker* v. *United States,* 196 Fed. 260, 268 (7 Cir. 1912).[3]

[3] The holding of the *Tucker* case that sentence of imprisonment cannot be had under a plea of *nolo contendere* was overruled in *Hudson* v. *United States,* 272 U.S. 451 (1926); however, its holding that rejection of the plea may be inferred from the fact that evidence was received by the trial court remains intact.

Unreasonable Delay in Sentencing and Lack of Procedural Due Process in Sentencing Procedure

This case presents important questions of interpretation of the Federal Rules of Criminal Procedure, as well as grave Constitutional issues, which should be determined by this Court. Rule 32(a) requires that "Sentence shall be imposed without unreasonable delay." However, in this case the trial court, after accepting pleas of *nolo contendere*, waited three months to sentence Petitioners, during which time it heard the Farnsworth trial. As demonstrated above, this delay was highly prejudicial to Petitioners. It was unreasonable and must be considered as "purposeful [and] oppressive" under the circumstances. *Pollard v. United States*, 352 U.S. 354, 361 (1957).

Rule 32(c) provides for a pre-sentence investigation report to be prepared by experienced and objective probation officers to assist the court in rendering sentence. Petitioners do not contend that the court in a normal *nolo contendere* case cannot consider the pre-sentence investigation report prepared by the probation officer. Petitioners are aware of the normal practice of the court hearing counsel for both sides as to what the evidence would show if the case had gone to trial on the issue of guilt or innocence. But to the certain prejudice of these Petitioners, most of the normal and traditional procedures were ignored in this case. The trial court did request pre-sentence reports. Such reports are not in the record, but it is indisputable that they showed Petitioners to be men with previously perfect reputations for honesty and integrity — highly respected members of the community. Although the record does not reflect it, it is nevertheless true that the probation officer regularly attended the Farnsworth trial. It would be strange indeed if the probation officer's pre-sentence reports in this case were not fairly accurate summaries of

the evidence adduced against Petitioners during the Farnsworth trial.

In upholding this sentencing procedure, the decision of the Court of Appeals conflicts in principle with *Townsend* v. *Burke*, 334 U.S. 736 (1948). In *Townsend* this Court reversed a sentence entered by a state court against an accused on the ground that the sentencing proceedings themselves failed to meet the standard of fairness required by due process. In *Townsend* there were statements made by the trial court during the sentencing proceedings which indicated that it was misinformed as to certain offenses thought to have been committed by the defendant. The truth was that some of the offenses had not taken place. This Court held that the sentencing proceedings lacked due process because the sentence was based upon a foundation materially false which the prisoner (who was without benefit of counsel) had no opportunity to correct.

In this case statements were made by the trial court on the day of sentencing which clearly established the unlawful foundation upon which it imposed sentences; a foundation based upon evidence adduced at the Farnsworth trial. This evidence had not been tested in accordance with the traditional constitutional safeguards and therefore it constituted as unrealiable a foundation as that described in *Townsend*. Clearly the evidence adduced at the Farnsworth trial *did* influence the sentences. As stated in *Townsend* (344 U.S. at 740):

> "... We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving."

It is no answer for the Government to say that Petitioners did not object to the delay, or, having asked for

early sentencing, nevertheless entered pleas of *nolo contendere* when the trial court refused to sentence until the Farnsworth case was completed. When an accused pleads *nolo contendere* he throws himself upon the mercy of the court, and it ill behooves him to push the court or to complain about the delay in sentencing. These circumstances cannot be fairly construed to result in a waiver of due process of law in the sentencing procedure.

Insufficient Indictment

An extremely important question concerns the validity of the indictment (R. 11; Appendix C, *infra*, p. 36a) under which Petitioners were convicted. It appears that this Court has never directly passed upon the requisites of an indictment for criminal income tax evasion. The necessity that such requisites be definitely established, and the importance of the matter, is shown by the fact that criminal indictments (or informations) in tax cases of all types were returned against 7,556 defendants during the fiscal year ended June 30, 1961, of which 948 were income tax and miscellaneous cases. ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30, 1961, p. 41.

The instant indictment purports to charge Petitioners with attempted evasion of income taxes imposed upon a large *corporation* — not their *personal* income taxes. Under such circumstances, it certainly should state facts sufficient, as a practical matter, to apprise each Petitioner with reasonable detail of the criminal acts attributed to him, so that each would know the charge against him and could prepare his defenses thereto. The indictment utterly fails in these respects. It is in the abbre-

viated form customarily used in personal income tax cases. While the short-form indictment could possibly be justified in a personal income tax evasion case, it is grossly inadequate and unfair in a corporate income tax case involving employees of varying responsibilities. The instant indictment does not inform Petitioners of the nature and cause of the accusation against them within the meaning of the Sixth Amendment to the Constitution of the United States, and it should be repudiated by this Court.

The decision of the Court of Appeals, in upholding the indictment, conflicts in principle with *Russell* v. *United States*, 369 U.S. 749 (1962), in which an indictment was held to be insufficient under analogous circumstances. In *Russell* this Court held that an indictment which does not apprise the accused with reasonable certainty of the nature of the accusation against him is defective although it may follow the language of the statute; and that an indictment in the language of the statute is not sufficient unless the words of the statute *fully, directly and expressly, without any uncertainty or ambiguity,* set forth *all elements* of the offense. 369 U.S. at 765. Manifestly, the instant indictment does not meet the above tests. It fails to charge that there was a tax deficiency, which — as recognized by this Court in *Lawn* v. *United States*, 355 U.S. 339, 361 (1958), and many lower court decisions — is "[O]ne of the basic elements of the offense." *Small* v. *United States*, 255 F. 2d 604, 606 (1 Cir. 1958). Nowhere does the indictment state how much tax the corporation *paid* for or during the years in question; consequently it cannot be fairly construed to charge existence of a tax deficiency. By the same token, the indictment utterly fails to charge that the accused had knowledge of any tax deficiency, another essential element of the offense. *Ingram* v. *United States*, 360 U.S. 672 (1959).

With reference to the conspiracy count of the indictment, the decision of the Court of Appeals is in direct and irreconcilable conflict with *United States v. Goldberg*, 206 F. Supp. 394, 397 (E.D. Pa. 1962), in which it was held:

> "Conspiracy to commit such a substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself. Ingram v. United States, 360 U.S. 672, 678, 79 S. Ct. 1314, 3 L. Ed. 2d 1503 (1959). It follows that persons can conspire to evade a tax only if they are fully aware of the existence of a tax obligation to the Government which they seek to conceal. Since income taxes become due and payable on an annual basis, it seems manifest that persons cannot at one and the same time conspire to evade more than one year's taxes."

The Court of Appeals stated that "We cannot accept the reasoning in the *Goldberg* case . . ." (T.R. 15; *infra*, p. 16a.)[4] It appears that no appeal will be taken by the Government in *Goldberg* since several other counts of the indictment were sustained.

The conspiracy count of the instant indictment is also fatally defective in that it wholly fails to charge, or even mention, essential elements of the substantive offenses which were alleged to be the object of the conspiracy, namely (1) existence of a tax deficiency, and (2) knowledge of a tax deficiency.

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[4] On this point the Court of Appeals relied upon *United States* v. *Johnson*, 123 F. 2d 111, 123 (7 Cir. 1941), *rev'd on other grounds* 319 U.S. 503 (1943). Since it appears that the indictment in the *Johnson* case charged a conspiracy to defraud the United States, rather than a conspiracy to commit offenses against the United States, it is readily distinguishable. Furthermore, the Court of Appeals in *Johnson* does not appear to have considered the precise argument adopted in *Goldberg*.

Misdemeanor Judgments

The judgments in this case present an important and live issue which should be determined by this Court. At the present time there are no clear guidelines to determine the effect of variances between the oral pronouncement and the written judgment in a criminal case. In the instant case Petitioners have been sentenced to terms of imprisonment for felonies. However, the written judgments adjudge them guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns" (R. 553-559; *infra*, pp. 30a-35a). The language first quoted describes the misdemeanor offenses proscribed by Sections 7203 and 7207, Int. Rev. Code of 1954, and Section 145(a), Int. Rev. Code of 1939. These misdemeanor offenses are lesser offenses included within the felony charges. Under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the misdemeanor. Pursuant to Rule 31(c) it was within the authority of the trial court to so convict Petitioners of the lesser included offenses.

It is Petitioners' contention that, as a matter of law, they stand convicted of misdemeanors — not felonies; that the written judgments are controlling. Similar issues were considered by this Court during the October Term, 1960 (Nos. 180, 184). In those cases the *Government* argued that the written judgments were controlling. However, both cases were affirmed by an *equally divided Court*, so the issue was not determined. *Payne* v. *Mandigan*, 274 F. 2d 702 (9 Cir. 1960), *aff'd* 366 U.S. 761 (1961); *Young* v. *United States*, 274 F. 2d 698 (8 Cir. 1960) *aff'd* 366 U.S. 761 (1961). Petitioners submit that the formal written adjudications of guilt cannot be dismissed as "clerical errors," under Rule 36, as was done by the Court of Appeals. Permitting the

district court to now substitute new written findings of guilt of felonies for the findings now in the judgments, under the guise of correcting clerical errors, goes far beyond the scope of existing authorities permitting correction of clerical errors. If the judgments do not constitute misdemeanor convictions they are patently wrong on their faces and must be set aside as wholly invalid.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated October 23, 1962.